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Supreme Court, U.S.
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No. 04-1305

In The
Supreme Court of the United States

KEVIN BALDADO,

Petitioner,

v.

HAWAII MANAGEMENT ALLIANCE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawai'i

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Every state in the nation is presently trapped between the duty to protect consumers and regulate insurance, and the problem of sufficiently avoiding a conflict with ERISA's enforcement scheme. Those with passive enforcement schemes may follow the guidance this Court provided in *Rush Prudential*.[1] The *Rush Prudential* test is **not** appropriate for the active enforcement schemes. The appropriate test for those cases would focus on differentiating schemes primarily purposed with regulation from those primarily purposed with providing a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme.

Thus, a new test would apply in circumstances in which the state official in charge of regulating insurance or health is granted original jurisdiction involving complaints about benefit or coverage determinations because the presumption should arise that the primary purpose of such a law is regulation. A health insurer or HMO challenging the state official's jurisdiction on ERISA preemption grounds should be required to show by clear and convincing proof that the primary purpose of the law is to provide a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme. The burden of proving a sufficient resemblance to a separate vehicle will, of course, never be met unless the challenger can show that the law provides the adjudicatory resources necessary to process any claim that might otherwise be asserted under ERISA, and absent such a showing it will be of no consequence that state law permits a party to seek judicial review of the agency determination if state law otherwise affords a right to judicial review of agency decisions.

The application of *Rush Prudential* in cases of active regulation has already proven to produce unreliable and conflicting results. The Maryland and Hawai'i high courts

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[1] *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002).

came to opposite conclusions applying *Rush Prudential* to their respective states' statutory schemes, which are alike in the relevant and material respects. The Opposition Brief failed to provide any substantive reason why Maryland's law, which provides a right of judicial review, should escape preemption while Hawai'i's should be preempted for the very reason that it provides a right of judicial review. Unless this Court resolves the conflict, the future will see further confusion while the various states implementing active regulatory schemes or modifying their existing schemes endeavor to copy Maryland's model (which was held not to be preempted), and avoid resemblance to Hawai'i's approach even though the two schemes are substantially alike.

A. The Hawai'i Court Expressly Ruled on the Questions Presented to This Court

While this Court's traditional rule has precluded a grant of certiorari only when "the question presented was not pressed or passed upon below. . . ." *see, i.e., United States v. Williams*, 504 U.S. 36, 41 (1992), it does not require as a condition of granting a petition that the questions be stated exactly as they were to the court below. Thus in *Stevens v. Department of Treasury*, 500 U.S. 1 (1991), this Court rejected the Solicitor General's argument that it had improvidently granted certiorari because the petitioner did not "present the merits of the timeliness issue to the Court of Appeals . . . ". *Id.* at 8 (holding District Court had decided timeliness issue when it undertook to hear case on the merits; and Court of Appeals likewise decided substantive issue but "answered the timeliness question incorrectly.") Indeed, this Court has held that a federal question is preserved if it is merely *clearly implied* from the record as a whole that the federal question was adequately presented in the state court proceedings. *Webb v. Webb*, 451 U.S. 493, 496 (1981).

The Petition exactly complies with the rule because the **Questions Presented** are drawn directly from the substance of the Hawai'i court's published opinion. First, the Hawai'i court's discussion makes it abundantly clear

that it considered whether Hawai'i's external review law, HRS § 432E-6, implicated ERISA's enforcement scheme sufficiently to warrant preemption. The court noted that "HMAA also argued that the federal courts had repeatedly held that ERISA preempts claims under state laws and that Hawai'i's enforcement scheme directly interferes with the rights HMAA has under ERISA." App. at 30a.[2] Moreover, the Hawai'i court ultimately held that ERISA preempts Hawai'i's external review law based on its erroneous conclusion that petitioners have the "right . . . to seek judicial review." App. at 26a.

As for the second **Question Presented**, the Hawai'i court's published opinion clearly implies that it considered the appropriateness of the *Rush Prudential* test. The court concluded, erroneously, that HRS § 432E-6 "so resembles an adjudication as to fall within *Pilot Life*'s[3] categorical bar . . . " App. at 24a, and apparently that HRS § 432E-6 provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme. App. at 25a-26a. Thus, the Petition has met this Court's requirements for consideration in the case of both of the **Questions Presented**.

Similarly mystifying is Respondent's argument that Petitioner should be denied a review based upon Rule 14(g) because he has not asserted that this Court has jurisdiction based on his timely raising of a federal question in the Hawai'i court.[4] Respondent was the appellant in the Hawai'i court, and the jurisdictional concern of Rule 14(g) was thus satisfied because Respondent based its appeal to the Hawai'i courts on an issue of federal law. The purpose of Rule 14 is to assure that the federal question was properly presented to the state court. *See Howell v. Mississippi*, 160 L. Ed. 2d 873, 879 (2005). It was hardly Petitioner's obligation to raise a question of federal law, but unquestionably the Hawai'i high court's decision was

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[2] Citations to "App. at ##a" refer to the respective pages in the Appendix to the Petition.

[3] *Pilot LIfe Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

[4] The Petition discusses the fact that Respondent's appeal from the Commissioner's order was based on a federal question. *See* Petition at 12.

based on federal law, and in fact reversed a lower court decision in Petitioner's favor rejecting Respondent's federal preemption arguments.[5]

B. Petitioner Correctly Interpreted the Hawai'i External Review Law HRS § 432E-6

Hawai'i's exemption from 29 U.S.C.S. § 1144(a) compels a different standard for Hawai'i with respect to ERISA preemption because ERISA was designed for voluntary employee benefit plans which employers are free to arrange and negotiate with plan administrators and benefit providers as they see fit. Employee health insurance coverage in Hawai'i is mandatory and the coverage provided must comply with the minimum benefits the law requires.[6] Hawai'i laws granting regulators jurisdiction over questions involving eligibility determinations and the interpretation of coverage contracts should be saved from preemption because their primary purpose is ensuring that managed care plans selling statutorily mandated coverage actually provide the benefits to which employees are entitled by the Prepaid Health Care Act. The attempt by Hawai'i's prepaid health plan contractors to use ERISA preemption as a shield against the Insurance Commissioner's oversight of their benefit determinations and interpretations of eligibility and coverage is directly at odds with the realization of the goals of the Prepaid Health Care Act which Congress expressly chose to exempt in Hawai'i's case from the operation of 29 U.S.C. § 1144(a).

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[5] Respondent's discussion of the Insurance Commissioner's review of its benefit denial, Opposition Brief at 2, is irrelevant as this case arose from the Commissioner's order awarding Petitioner his attorneys' fees and costs in connection with the review of the benefit denial. Respondent profited from the circumstance in which the merits of its position were never tested because Medicaid paid for Petitioner's urgently needed treatment before an appeal could be taken.

[6] The Opposition Brief, at 5, misstates the Petition's comments about Hawaii's Prepaid Health Care Act, H.R.S. Chap. 393. The Petition correctly states, "Congress added 29 U.S.C.S. § 1144 to federal law in 1983, exempting the PHCA from preemption by ERISA." Petition at 5. Petitioner's point required no additional historical facts.

Respondent concedes that the Hawai'i court's decision in this case was wrong unless HRS § 432E-6 provides all health insurance beneficiaries with an "actual right" to a review by a three-member panel.[7] The essential provisions that were never incorporated into HRS § 432E-6 explain and further confirm that the statute was not intended to provide such a right to a review. If the Legislature intended for all beneficiaries to have an "actual right" to an alternative enforcement scheme, it was grossly negligent in providing the Commissioner with the necessary resources.

With more than three-quarters of a million insureds in the State, the number of hearings by three-member panels, each of which must include one practicing physician, could easily exceed in any given fiscal year the total number of physicians eligible to serve on a review panel. HRS § 432E-6 provides no authority for the Commissioner to compensate the physician panelists, and in fact Respondent would have to concede that the physicians and insurance industry panelists are always volunteers. Furthermore, HRS § 432E-6 omits to provide the Commissioner with any other adjudicatory resources necessary to enable him to hold hearings on the hundreds – and potentially thousands – of petitions that might be filed in any year. HRS § 432E-6 does, however, grant the Commissioner broad discretionary powers to determine whether a petition will be granted a hearing at all, and therein lies the explanation of the omitted resources.

Likewise, had the Legislature intended to provide an alternative to ERISA's enforcement scheme, its failure to provide the due process necessary to constrain the Commissioner's discretion would also constitute gross negligence. The federal and state courts sharing concurrent jurisdiction over actions under 29 U.S.C. § 1132(a) are not accorded the complete unreviewable discretion to summarily reject a complaint *sua sponte*. Respondents concede, however, that the Commissioner has the power to reject

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[7] Opposition Brief at 12.

petitions *sua sponte*, and that HRS § 432E-6 provides no mechanism for a review of such decisions.[8] The Commissioner's interpretation of the statute, that it does not confer an actual right to external review, explains why the Legislature provided no appeal for petitions the Commissioner rejects.[9]

Further, HRS § 432E-6(a)(2) can only be read as providing the Commissioner with two alternatives to proceeding with a hearing by a three-member panel on petitions he decides to consider. App. at 47a. Respondent asserts that HRS § 432E-6(a)(2) provides the Commissioner with a means to obtain evidence to present to an external review panel. The Commissioner cannot, however, function both as the ultimate decision maker and a party – or some other role-player – presenting evidence to the three-member external review panel. Respondent's assertions concerning the alternative processes HRS § 432E-6(a)(2) affords the Commissioner are thus utter nonsense.[10]

The exemption from HRS § 91-9(g) provided by HRS § 432E-6(a)(2)(A) is also easily explained in light of the Commissioner's true role as the ultimate decision maker. The Hawai'i Administrative Procedure Act ("HAPA") does not permit the Commissioner to consider any evidence not in the record in reaching a decision in a contested case, and a request for external review under HRS § 432E-6(a) nominally meets the definition of contested cases under Hawai'i law because a petitioning beneficiary is contesting a managed care plan's determination. The exemption from the HRS § 91-9(g) prohibition against the Commissioner's consideration of evidence outside the record from the

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[8] Respondent's likening of the Commissioner's discretionary power to the established court process for dismissal for failure to state a claim is absurd. Opposition Brief at 14.

[9] Whether or not the record below expressly includes the fact that the Insurance Commissioner possesses such complete discretionary power, and has exercised it in a majority of cases since July 2000, it is undisputed that it was a matter of public knowledge when the Hawaii court heard Respondent's appeal.

[10] Opposition Brief at 11-12.

internal appeal allows him to obtain the expertise needed to determine whether the plan's determination complied with the law without having to resort to a hearing by a three-member panel.

Moreover, the Commissioner need not retain a medical expert if he decides to have the case heard by a three-member panel because the parties would be permitted to provide expert testimony as part of that proceeding. Likewise, HRS § 432E-6(a)(2)(B) does not suggest in any way that the Commissioner's authority to retain an independent review panel is for the purpose of providing advice to the three-member panel. The independent review organization and the three-member panel serve precisely similar purposes, providing the Commissioner with an opinion on which he can make a determination in the case. Furthermore, Respondent's assertion the Legislature intended the Commissioner to provide an independent opinion to the panel whose sole purpose is providing him with an opinion for his ultimate decision is similarly irrational.

Respondent's assertion – found in footnote 5, Opposition Brief at 9 – that the Commissioner has not interpreted HRS § 432E-6 consistent with its obvious construction, is not entitled to any credit. In their Rule 12.6 letter dated April 8, 2005, the "State Defendants" (the Insurance Commissioner, Division of Insurance, Department of Commerce and Consumer Affairs, and the State of Hawai'i) confirmed their complete support of the Petition:

> State Defendants submit this letter to notify this Court that they intend to remain a respondent party in this case, **that they *support* the petition for certiorari filed by Petitioner Kevin Baldado**, that they submit this letter in lieu of a formal brief in support (given that their support is expressed in only a single sentence), and that in the event certiorari is granted, State Defendants intend to participate in this case on the merits.

(Emphasis in the original).

C. The Maryland and Hawai'i Statutory Schemes Are Alike in the Material Respects

Respondent concedes that both the Hawai'i and Maryland statutory schemes similarly provide the right to judicial review of decisions in contested case hearings.[11] Because the Hawai'i court determined that this feature was "fatal" to Hawai'i's law with respect to preemption, App. at 25a, and the Maryland court did not, the two decisions inherently conflict. Respondent's attempts to distinguish the Hawai'i and Maryland schemes in other respects misstate the elements of the laws in both states, and are thus unavailing.

First, the coverage of the Hawai'i and Maryland schemes appears to be essentially the same. In discussing Maryland's statutory scheme, the court in *Conn. Gen.* held that:

> The Commissioner. . . . makes a determination of whether the service *was covered and medically necessary*. The decision concerning medical necessity may be based "on the professional judgment of an independent review organization or medical expert." § 15-10A-05(a).

Conn. Gen. Life Ins. Co. v. Ins. Comm'r for Md., 371 Md. 455, 459, 810 A.2d 425, 427 (Md. 2002) (emphasis added). Respondent's assertion that "[t]he Maryland statute, unlike the Hawai'i statute, applies only to decisions regarding whether a service 'is or was not medically necessary appropriate or efficient' . . . " thus understates the scope of the Maryland commissioner's jurisdiction.

Respondent further concedes that under Maryland law, a party has the **right** to a contested case hearing.[12] Maryland's law thus apparently more closely resembles a separate vehicle to assert a claim for benefits outside of

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[11] Opposition Brief at 20-21.

[12] "Once Maryland's commissioner issues an order in connection with the external review, all parties are given the opportunity to request an administrative hearing pursuant to Md. Code Ann., Ins. § 2-210A-01." Petition at 22.

ERISA's remedial scheme than does Hawai'i's, because the Hawai'i Commissioner's unreviewable authority to deny a requested contested case hearing cuts off the "right" to judicial review for all rejected petitions.[13]

The three purposes of the 146-word Illinois statute in *Rush Prudential* are to provide every insured, without exception, with the right to a second opinion, to require the HMO to provide the benefit if the second opinion determines it to be medically necessary, and to provide physicians giving second opinions some measure of protection from being discriminated against by the HMO. *See* App. at 41a-42a. The Illinois statute does not refer to a right of judicial review. There is no right to a second opinion under either the Hawai'i or the Maryland laws. As set forth above, court in *Conn. Gen.* held that the Maryland commissioner's "decision concerning medical necessity *may* be based 'on the professional judgment of an independent review organization or medical expert.'" § 15-10A-05(a)." *Conn. Gen.*, 371 Md. at 459 (emphasis added). Likewise, HRS § 432E-6(a)(2), *see* App. at 47a, affords Hawai'i's commissioner the option of obtaining a second opinion either from an IRO or a medical expert. Thus, the Maryland and Hawai'i schemes are alike in their differences from the primary purposes of the Illinois statute, and the passive scheme of the Illinois statute simply cannot be compared to Maryland's active regulatory plan any more than it can be compared with Hawai'i. Respondent's assertion that the Maryland law "much more closely resembles the Illinois statute," Opposition Brief at 19, plainly misstates the facts. Maryland and Hawai'i have active regulatory schemes alike in the material respects that differentiate them from the Illinois statute, and thus *Rush Prudential* does not provide the appropriate rule.

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[13] Respondent's contention that, "Under Hawaii law, the first level of external review by the Insurance Commissioner involves an evidentiary hearing before a three-member panel . . . " misstates the plain meaning of the statute and thus does not explain the Hawaii court's erroneous conclusions. Opposition Brief at 19.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to resolve the conflict between the Maryland and Hawai'i state court decisions interpreting *Rush Prudential* and ERISA preemption, and to correct the Hawai'i court's erroneous consequential decision involving federal law.

Respectfully submitted,

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